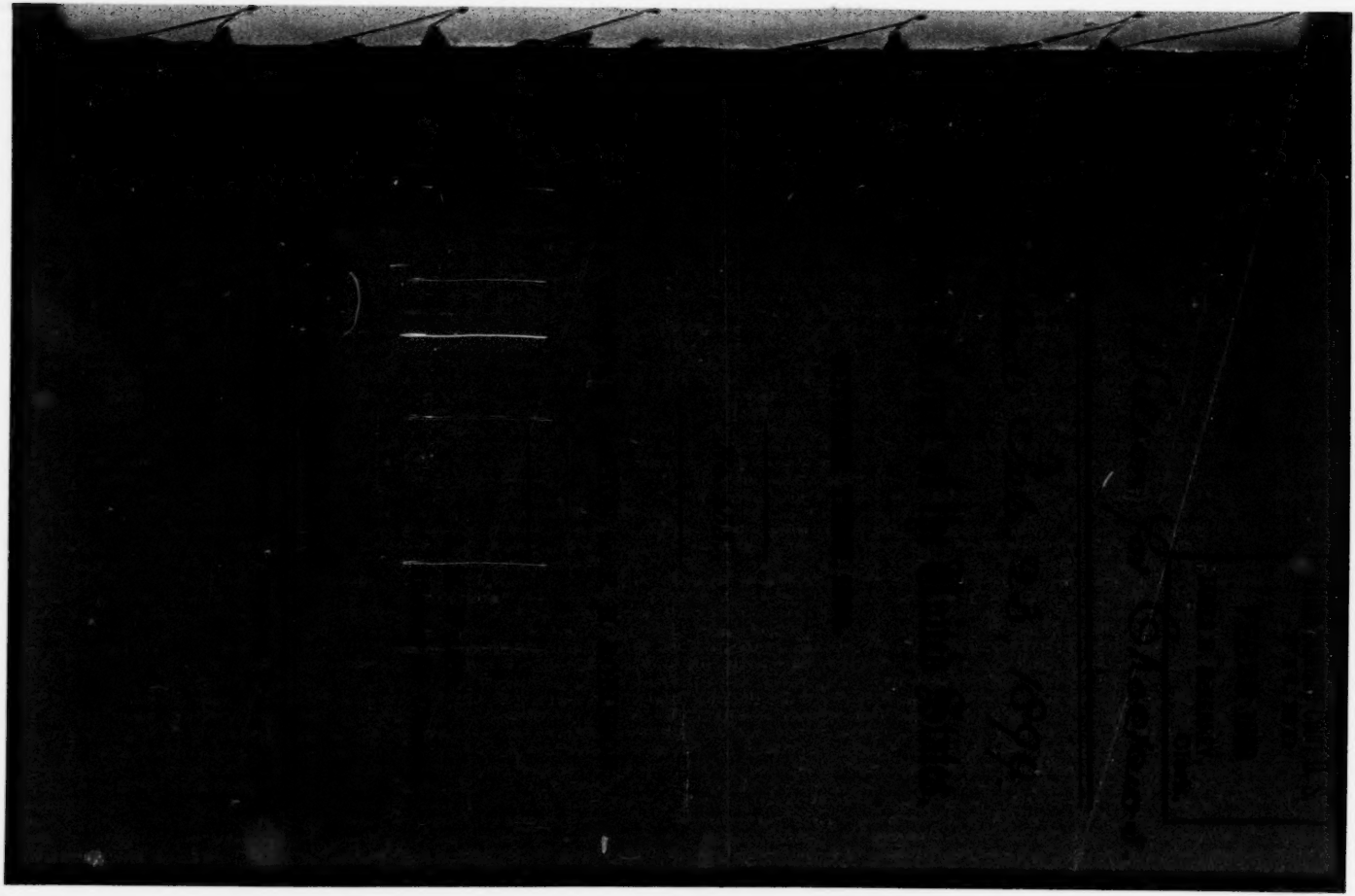

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 453.

THE CHOCTAW NATION *vs.* F. R. ROBINSON.

STATEMENT.

I.

On the 7th of September, 1896, applicant, F. R. Robinson, applied to the commission known as the Dawes commission to be enrolled as an intermarried citizen (R., p. 1).

II.

His petition shows that he is a white man; that he married an Indian woman of Choctaw and Chickasaw blood September 21, 1873.

III.

This Indian wife died, and he married a white woman August 10, 1884, with whom he now lives.

IV.

To this petition the Choctaw Nation made the objections (*a*) that the commission had no jurisdiction because the act

of Congress creating the commission is unconstitutional and void; (*b*) that the applicant had not applied for citizenship to the tribunal of the Choctaw nation constituted to try questions of citizenship; (*c*) that his right to be enrolled as a citizen was forfeited by his remarriage (Rec., pp. 3, 4).

V.

The Dawes commission granted the petition (Rec., p. 4).

VI.

From this action of the commission the Nation appealed to the United States court for the central district of the Indian Territory (R., p. 5), alleging that claimant had married a Choctaw woman, who died; that he afterwards married a white woman not a citizen of the Choctaw nation.

VII.

The claimant filed in the court a certificate dated June 2, 1897, that he is enrolled as a citizen by intermarriage (R., p. 7), but when he was enrolled does not appear.

VIII.

The case was referred to a master, who reported that plaintiff was married in the Choctaw nation to a Choctaw woman, according to the laws of the nation, September 21, 1873; that his wife died April 1, 1884, and he afterwards (August 10, 1884) married a white woman (R., p. 8).

The court adjudged him to be a citizen (R., p. 9).

Assignment of errors will be found (R., p. 10).

I.

This record presents one of the questions involved in these Choctaw citizenship cases, viz:

CAN THE UNITED STATES DETERMINE WHO SHALL BE A CITIZEN OF THE CHOCTAW NATION, OR IS THAT A RIGHT THAT RESTS EXCLUSIVELY IN THAT NATION?

This question is common to all the cases before this court.

As to this question—

By the act approved June, 1896, 29th Stats., 339, and the amendment of June 7, 1897, — Stats., 84, provision was made to determine the right to citizenship in the Choctaw nation by the "Dawes commission" in the first instance and on appeal by the Federal court.

The Choctaw Nation contends that the United States has not the right to determine who shall be citizens of that nation, but that this is a right that vests in that nation exclusively as the sovereign.

The right to be citizens of this nation is of very great importance because of the fact that it is now contemplated to terminate the Indian government, and in that event the lands or their proceeds must be divided among the citizens when the national existence is destroyed. The number of persons between whom the division shall be made is of serious consequence.

This contention of the Choctaws is based on the character of their ownership of the land and their right to govern themselves, in all respects, subject only to such legislation by Congress as is provided for by the Constitution.

(*a.*) The relation between Indian tribes or nations and the United States has been often before this court.

They have been denominated domestic dependent nations.

Cherokee Nation *vs.* Georgia, 5 Pet., 1.

It has been held that they are States in a certain sense, although not foreign States or States of the United States within the meaning of the Constitution.

Holden *vs.* Joy, 17 Wall., 211.
Warren *vs.* Joy, 17 Wall., 253.

"They were and always have been, regarded as having a "semi-dependent position when they preserved their tribal "relations: not as States, not as nations, not as possessed of "the full attributes of sovereignty, but as a separate people, "*with the power of regulating their internal and social relations*, "and thus far not brought under the laws of the Union or "of the State within whose limits they resided."

U. S. *vs.* Kagama, 118 U. S., 381, 382.

Generally the Indian title is that of occupancy. The ultimate fee is in the United States. But this title by occupancy has always been considered one that the Indians had a right to enjoy.

It has always been recognized as a property right by the United States.

But the Choctaws hold the lands now occupied by them by a very different tenure.

They held by the title by occupancy a vast tract of land east of the Mississippi river.

From time to time they made cessions to the United States diminishing the area.

But by the treaty of 1820 (7 Stats., 211, sec. 2), in consideration of a cession of a portion of their lands east of the Mississippi, the United States ceded to them a tract west of that river within specific boundaries.

That was an absolute cession, and vested the lands in the Choctaw nation. They acquired not a mere right of occupancy, but an absolute title.

In 1830 another treaty was made with them (7 Stats., 333); they ceded their entire country east of the Mississippi

to the United States, and the United States agreed to convey to them, and afterwards by patent did convey to them, "*in fee-simple to them and their descendants*," the lands they now occupy, which had been ceded to them by the treaty of 1820.

They are not, therefore, holding their lands by the Indian title of occupancy, but in fee.

In 1855 another treaty was made with them (11 Stat., 611).

By article I the boundaries of the Choctaw and Chickasaw country are defined, and then follows this:

"And pursuant to an act of Congress approved May 28, "1830, the United States do hereby forever secure and guar- "antee the lands embraced within the said limits to the "*members* of the Choctaw and Chickasaw tribes, their heirs "and successors, to be held in common; so that each and "every member of either tribe shall have an equal, undi- "vided interest in the whole."

Again, in 1866, a treaty was made with them (14 Stats., 769), article II of which recites that the land occupied by them "is now held by the members of said nations in common," under the provisions of the treaty of 1855, from which quotation has been made above.

So that there can be no dispute that they hold this territory not by occupancy, but in fee.

II.

The Status of the Choctaws and Chickasaws as Nations.

The United States had made five treaties with the Choctaws prior to 1820, above referred to—viz., in 1786, 1801, 1802, 1803, 1805, and 1816—and had made five treaties with the Chickasaws.

By the treaty of 1830 (7 Stats., 333), the United States having ceded by article I this country in fee, as above stated, by article IV, it is stipulated that—

"The Government and people of the United States are hereby obliged to secure to the said Choctaw nation of red people the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have the right to pass laws for the government of the Choctaw nation of red people and their descendants; and no part of the land granted them shall ever be embraced in any Territory or State; but the United States shall forever secure said Choctaw nation from and against all laws except such as from time to time may be enacted in their own national councils not inconsistent with the Constitution, treaties, and laws of the United States, and except such as may and which *have been* enacted by Congress, to the extent *that Congress under the Constitution are required to exercise a legislation over Indian affairs.*"

The Choctaws then had a written constitution, a government divided into executive, legislative, and judicial departments. The Chickasaws had not; but the latter nation having by the treaty of 1837 acquired from the Choctaws an interest in these lands, it was by the treaty of 1855 (11 Stat., 612), article IV, provided that "the government and "laws now in operation and not incompatible with this instru- "ment shall be and remain in full force and effect within "the limits of the Chickasaw district until the Chickasaws "shall adopt a constitution and enact laws," &c.—that is, the laws made by the Choctaws should be the laws for the Chickasaws until the latter formed a government of their own and enacted laws of their own.

Article VII of this treaty of 1855 provides that *so far as compatible with the Constitution of the United States and the laws made in pursuance thereof regulating trade and intercourse with Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government and full jurisdiction over person and property within their respective limits.*

By article X of the treaty of 1866 (14 Stat., 774) the United States reaffirmed "all obligations arising out of treaty stipu-"lations or acts of legislation with regard to the Choctaw "and Chickasaw nations entered into prior to the late rebel-"lion," &c., and provided in section XI for taking lands in severalty "should the *Choctaw and Chickasaw people through "their respective legislative councils*" so agree.

And further, by article XXXVII, "the legislatures of the said nations were authorized to fix the amount that should be paid out of the funds of other Indians who might remove into their territory and make selections of lands."

And again, by article XLIII, "all persons except agents, "&c., of the Government, &c., are excluded from this terri-"tory unless formally incorporated and *naturalized* by the "join taction of the authorities of both nations into one of "said nations of Choctaws and Chickasaws according to "their laws, customs, or usages."

And, finally, by article XLV, all their "rights, privileges, and immunities" under former treaties and legislation are declared to be "in full force."

As already stated, the Choctaws had a government under a written constitution, with executive, legislative, and judicial departments, prior to the treaty of 1855. Since that time they have adopted a new constitution, providing for a similar division, and under which this territory was divided into judicial districts, and since 1855 the Chickasaws have adopted a constitution by which a similar government was organized. These governments are still in existence.

They have their legislative assemblies, their executive, and their courts of justice, and the United States, by the treaties above mentioned, have stipulated that they should make their own laws and have their courts to adjudicate all matters appertaining to their persons, property, and rights. The laws of no State or Territory were ever to be extended over them, nor was the Government of the United States to legislate with respect to them, except so far as re-

quired by the Constitution of the United States; and this condition was to continue so long as they maintained their tribal or national existence.

We have, then, a complete nationality—a complete government—occupying a territory that they purchased for a valuable consideration, and their citizens are subject alone to its jurisdiction and control. They are independent of congressional legislation, except the power to regulate commerce.

But the power of Congress to regulate commerce does not include the power to determine who shall or shall not be citizens of the Choctaw and Chickasaw nations. Every nation has the right for itself to determine who shall be its citizens, and this must be especially so in this case, because ordinarily citizenship only confers political rights and obligations, while in the case of the Choctaws citizenship not only confers political rights, but confers property rights as well.

Therefore, if the United States can confer citizenship in these nations, it is by that act granting to the party upon whom it is conferred a property interest in the lands of these Indians, thereby seriously affecting the rights of others. And in this connection I venture to state as a part of the history of the times of which the court will take judicial notice (and the fact appears in the cases before the court) that as soon as it was indicated that this Territory was to be divided among these tenants in common, either by allotment or sale or both, thousands of persons immediately claimed citizenship who had never claimed it before, and many Choctaws (of whom more hereafter) who remained east of the Mississippi river, and the descendants of such who never resided in the Choctaw nation west of the Mississippi and never were there, are now applying to be enrolled as citizens, although non-residents, to the end that they may share in this division.

What the Choctaws insist upon is that through their own

courts or their own legislative counsel and by their own laws they may decide who are entitled to be enrolled as citizens of the nation. The right to do this is a substantial right guaranteed to them by the treaty provisions to which attention has already been called, and is a right that involves property interests that cannot be stricken down by the United States without their consent.

This right has never been surrendered. If it has been taken away from them, it has been by the arbitrary act of the United States.

We cannot contend, in the light of the *Cherokee Tobacco Case* and the case of *Thomas vs. Gay*, 169 U. S., 264, and others, that Congress cannot repeal a treaty by a statute.

Have the treaty provisions which secure to them self-government and in which is involved the determination of citizenship been repealed? If so, it is only by the Dawes Commission act.

No act of Congress will be given the effect of repealing these treaty provisions unless it is clearly so intended. Such a repeal by implication will not be favored.

In the Indian appropriation act of the 3d of March, 1893 (27 Stats., 645), the commission now known as the Dawes commission is provided for. The President is authorized to appoint three commissioners to negotiate with the Cherokees, Choctaws, Chickasaws, Creeks, and Seminoles "for the "purpose of the extinguishment of the national or tribal "title to any lands within the territory now held by any and "all of such nations or tribes, either by the cession of the "same or some part thereof to the United States or by the "allotment and division thereof in severalty among the "Indians of such nations or tribes, respectively, as may be "entitled to the same or by such other method as may be "agreed upon, * * * with a view to such adjustment, "upon the basis of justice and equity as may, with the con-"sent of such nations or tribes of Indians, so far as may be

" necessary, be requisite and suitable to enable the ultimate " creation of a State," &c.

The act then proceeds to provide for the salaries of the commissioners, the appointment of a secretary, stenographer, and interpreter, the regulations and duties of the commission, and gives the commissioners power to negotiate agreements to effectuate the purpose for which the commission was created.

In the appropriation act of June 10, 1896 (29 Stats., 339), the duties of said commission were enlarged. The commission " is further authorized and directed to proceed at once to " hear and determine the applications of all persons who may " apply to them for citizenship in any of said nations, and " after such hearing they shall determine the right of such " applicant to be so admitted and enrolled: *Provided, how-* " *ever*, * * * That in determining all such applications " said commission shall respect all laws of the several na- " tions or tribes not inconsistent with the laws of the United " States and all treaties with either of said nations or tribes, " and shall give due force and effect to the rolls, usages, " and customs of each of said nations or tribes." This sec- " tion further provides that—

" The rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes, and whose right thereto has either been denied or not acted upon, or any citizen who may within three months from and after the passage of this act desire such citizenship, *may apply to the legally constituted court or committee designated by the several tribes for such citizenship*, and such court or committee shall determine such application," &c.

The section then prescribes the powers of the commission in this regard, and provides for an appeal by the tribe or person aggrieved from the decision of the commissioners to the United States district court, the decision of said court to

be final. After some further provisions regarding the duties of the commission, the act provides:

"It is hereby declared to be the duty of the United States to establish a government in the Indian Territory which will rectify the many inequalities and discriminations now existing in said Territory and afford needful protection to the lives and property of all citizens and residents thereof."

The provision last above quoted is the only provision in the act creating the Dawes commission or the act enlarging the powers and duties thereof that in any way touches upon the assumption of jurisdiction over the Indians and their lands by the United States. There is no express abrogation of the rights and jurisdiction guaranteed to the Indians themselves by the treaties already set forth. Therefore if these treaty provisions conferring exclusive jurisdiction upon the Indians of their lands and themselves are annulled and repealed, it can only be by implication.

In Endlich on the Interpretation of Statutes, pages 280, 281, it is said that—

"Repeal by implication is not favored. It is a reasonable presumption that the legislature did not intend to keep really contradictory enactments in the statute book, or to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted unless it is inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention. Hence it is a rule, founded in reason as well as in abundant authority, that in order to give an act not covering the *entire ground* of an earlier one *nor clearly intended as a substitute* for it the effect of repealing it the implication of an intention to repeal must clearly flow from the language used, disclosing a repugnancy between its provisions and those of the earlier law so positive as to be irreconcilable by any fair, strict or liberal, construction of it, which would, without destroying the evident intent and meaning, find for it a reasonable field of operation, preserving at the same time

the force of the earlier law, and construing both together in harmony with the whole course of legislation upon the subject."

"In the absence of any repealing clause it is, however, "necessary to the implication of a repeal that the object of "the statutes as well as the subject be the same" (Am. and Eng. Ency. Law, vol. 23, p. 482). The object of the statute in the present case is not to take away the jurisdiction of these Indian nations over their citizens. The commission is appointed only for the purpose of negotiating with the Indians and securing their consent to the ultimate assumption of jurisdiction and the creation of a State by the United States, and these acts are not intended by Congress as an interference with the right of the Indians to determine their own citizenship.

It is respectfully submitted that by the legislation in question the right of self-government has not been repealed, and if not, then the right to determine citizenship rests in that nation, and the Dawes commission and the court on appeal or as a matter of original jurisdiction was without lawful authority to conclude the nation or to interfere with its sovereign authority in this respect.

The Mickle Case.

Record No. 449:

STATEMENT.

Harmon Mickle, a white man, married Susanna Morris, a Choctaw by blood, in 1847. Susanna died and her husband, Harmon, in 1852, married Joanna McSweeny, a white woman, in Arkansas. *Joanna* makes claim to be enrolled as a citizen.

The other claimants are—

Nicholas Mickle, a son of Harmon and Joanna.

Nora Mickle, wife of Nicholas.

Lawrence Mickle, son of Nicholas and Nora.

John Mickle, son of Nicholas and Nora.

William Mickle, son of Harmon and Joanna.

Peter Mickle, son of Harmon and Joanna.

The six children of Christopher C. Payne and Joanna Margaret Payne (*née* Mickle), deceased, to wit:

Daisy L. Payne.

Louis O. Payne.

Jessie H. Payne.

Joanna M. Payne.

Willie E. Payne.

Gussie L. Payne.

All of the above were adjudged to be entitled to enrollment.

Harmon Mickle is dead. Joanna, the white woman who was married to him in Arkansas, is making claim of citizenship, and her children by that marriage and grandchildren are likewise making such claim. There is no Indian blood in any of them.

The whole of these claims therefore rest upon the citizenship of Joanna. If she was not a citizen, none of the others are. Her marriage to Harmon Mickle was in direct contravention of the act of the Choctaw council approved October, 1840. (See Pamphlet of Opinions, p. 28.)

That act is as follows:

"SEC. 4. That no white man shall be allowed to marry in this nation, unless he has been a citizen (evidently meaning a resident) of this nation for two years.

"*And be it further enacted*, That he shall be required to procure a license from some judge, or the district clerk, and be lawfully married by a minister of the gospel, or some other authorized person, before he shall be entitled and admitted to the privileges of citizenship.

"*And be it further enacted*, Should any officer or minister of the gospel who are authorized to marry in this nation, perform such marriage ceremony, not agreeable to this act, he shall be made to pay a fine of one hundred dollars," &c.

By this act it will be seen that citizenship by virtue of such a marriage is expressly prohibited, and the minister or officer who solemnizes a marriage without a license procured, &c., as the act directs, is liable to punishment. It is therefore impossible that the marriage in this case could entitle the party or her descendants to be enrolled as citizens.

The Cundiff Cases.

No. 644.

In this record will be found a number of cases that were consolidated and tried together in the court below.

They are specified on pages 43, 44.

The claimants Nancy Lee Caudiff, Mattie Lee Armstrong, Bonnie Durant Armstrong, and Layton Burford Armstrong were admitted to citizenship by an act of the Choctaw general council approved November 8, 1895.

There is is no controversy as to them (R., pp. 46, 47).

The claimants Varina Davis Potts, Mary J. Potts, Edward Potts, Robert J. Caudiff, Robert S. Caudiff were by the court adjudged to be citizens by blood.

The claimant William G. Potts was adjudged not to be entitled to citizenship, because he was not married in conformity with the marriage laws of the nation (R., p. 50).

This applicant, William G. Potts, married Varina Davis Cundiff in Texas September 25, 1897, pursuant to a license issued by the clerk of Wise county September 24, 1897 (R., pp. 19, 20). His application was denied.

The other claimants, thirty in number (and the children of J. Q. Ward and Maggie Ward), are non-residents of the Territory, and their applications were rejected (R., p. 51).

The questions here presented are, first, whether a white man who has married a woman of Choctaw blood in the State of Texas, according to the laws of Texas, and not

according to the laws of the Choctaw nation, is entitled to enrollment as a citizen.

The Choctaw law on the subject will be found at page 28 of the Pamphlet of Opinions, and is elsewhere quoted in this brief.

In the light of this law, which the Choctaws undoubtedly had the right to enact, the marriage in Texas could not make this white man a member of the Choctaw nation.

2d. The second question presented by this record is, ARE THESE NON-RESIDENTS ENTITLED TO BE ENROLLED AS CITIZENS?

There is nothing to indicate that any one of them ever *lived* in the nation or in any way affiliated with the Choctaw people.

The treaty provisions bearing on this subject are so elaborately considered in the opinion by Clayton, J., that it is deemed unnecessary to do more than to refer to that opinion (pp. 4 to 21, inclusive, and 24 to 27, inclusive, and 27 to 38, inclusive).

But there are other reasons why some of these parties are not entitled to be enrolled.

James Daly makes claim because he married Sarah Caroline Durant, a sister of Nancy Lee Cundiff, who was made a citizen by act of council (R., p. 9).

He married in Texas. He swore to his application in Texas, and he lives in Texas. He was not married according to the requirements of the laws of the Choctaw nation, which has been considered in another connection.

The case of Horace F. Butts is similar to that of Daly (R., p. 22).

The case of James Quincy Ward is of the same character (R., pp. 31, 32).

The Nabors Case.

No. 648.

The claimants in this case are "*Mississippi Choctaws.*" They never resided in the Indian Territory (R., p. 11). They are of those who elected to remain east of the Mississippi. All of the treaty provisions affecting this class of cases are set forth in the opinion of Clayton, J, which will be found in the pamphlet before alluded to (R., pp. 4–21, inclusive) and to which reference is made. They elected to remain in Mississippi and became citizens of that State. They never subjected themselves to the government of the Choctaw nation or assumed any duties or obligations to that nation. Any rights they might have had by removing they abandoned by not removing.

Eastern Band of Cherokees, 117 U. S., 288.

Summary.

The records in the cases herein considered, it will be observed, present the following questions:

1st. Whether the Dawes commission can so determine the question of citizenship as to bind the Choctaw nation?

2d. Whether the Mississippi Choctaws, still living in Mississippi, are entitled to be enrolled as citizens?

3d. Whether other non-residents are so entitled.

4th. Whether white men who have married women of Choctaw blood outside the nation and not in conformity with its laws are entitled to be enrolled.

There are other questions involved in cases now before the court arising out of article 38 of the treaty of 1866.

"Article 38. Every white person who having married a Choctaw or Chickasaw resides in said Choctaw or Chickasaw nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation and shall be subject to the laws of the Choctaw and Chickasaw nations according to his domicile and to prosecution and trial before their tribunals and to punishment according to their laws in all respects as though he was a native Choctaw or Chickasaw."

Under this article the following questions arise:

1st. Are its provisions applicable to any white persons other than such as had already married persons of Choctaw blood?

It is submitted that the very language shows that it only applies to marriages theretofore contracted: "Who *having* married, *resides*," &c., * * * "or who *has* been adopted," &c., both obviously events of the past.

Such white persons are to be *deemed members of the nation, &c.*

2d. Now, for what purpose or to what extent were they to be so deemed?

Before that treaty such persons were not subject to the criminal laws of the Choctaw nation, and this was placed in the treaty to make such a person subject to said laws, and to prosecution, trial, and punishment "according to their laws." It was for this that he was to be deemed a citizen and not to confer upon him property rights.

3d. This provision does not extend to any white person other than the one who had then married a Choctaw. But if that white person subsequently married another white person, the latter would not be made a citizen by the terms of this treaty provision.

It is the marriage of a white man or woman to a *Choctaw* that makes such white person a member, and a *white* person cannot become a member by marrying a *white* person after the death of the Choctaw husband or wife by reason of the marriage to whom the membership existed.

The marriage that will give membership must be that of a white person to one of Choctaw blood.

Another question that is presented in some of these cases grew out of conditions that arose after the treaty of 1866 To illustrate: Suppose a Choctaw man to have married a white woman. He died. Then this white woman married a white man. That white man was not subject to Choctaw laws.

The United States authorities could not or would not remove him from the nation because he was married to a member of the nation.

If he committed an offense he must be tried in Arkansas, with all the attendant inconvenience, expense, etc.

To remedy this the Choctaw council enacted the statute of 1875, the fifth section of which is as follows:

"Should any man or woman a citizen of the United States or of any foreign county become a citizen of the Choctaw nation by intermarriage as herein provided, and be left a widow or widower, he or she shall continue to enjoy the rights of citizenship unless he or she shall marry a white man or woman or person as the case may be having no rights of Choctaw citizenship by blood, and in that case all his or her rights acquired under the provisions of this act shall cease."

(The entire act will be found at pp. 29, 30, 31, of the Pamphlet of Opinions.)

The Choctaw council had the right to enact such a law.

After this enactment no citizen of the United States or of any foreign country could become a citizen of the Choctaw nation by marriage, except upon complying with its provisions, viz: He must procure a license from a clerk or

judge; he must show that he has not a wife; he must show good moral character; he must take an oath to support the constitution and laws, etc.

Married according to these provisions made him a citizen. But if he or she married a white man or woman having no right of citizenship by blood, his citizenship terminates. He decitizenizes himself by that act.

Persons who are within any of the classes above mentioned are not entitled to enrollment.

Respectfully submitted.

J. M. WILSON,
Attorney for Choctaws.

OPINIONS

CLAYTON, J.,

IN

CHOCTAW CITIZENSHIP CASES.

CHOCTAW CITIZENSHIP CASES.

There are upon the docket of this court, appealed from the commission to negotiate with the five civilized tribes, known as the Dawes commission, two hundred and forty-one cases, involving the right of citizenship in the Choctaw nation of about twenty-five hundred applicants.

All of these cases have been by my predecessor, Judge Lewis, placed on the equity side of the docket, and in the case of Mary A. Sanders, No. 63, a motion to transfer to the law side of the docket was filed and argued and by him overruled. It is not my purpose in these cases to disturb or to go back and open up questions already decided, but to adopt the past rulings of the court and to proceed as rapidly as possible to a final disposition of them. In passing I will remark, however, that it seems to me that the peculiarity of these cases—the many suits brought by persons having a common interest and a common purpose against the same defendant, the difficulties of enforcing the rights by judgments at law, and the many equities claimed by both parties to these suits—make them proper cases for a court of equity.

The question of the jurisdiction of this court to hear and determine these cases has been raised by the pleadings. The counsel on neither side, however, have seen fit to press this question or to point out, either by brief or oral argument, the reasons for this contention. The statute giving the court jurisdiction is plain and I know of no constitutional objections. It has been said, however, that Congress does not possess the power, under the Constitution, to give to the courts of the United States appellate jurisdiction over the final orders and awards of commissions and other such

tribunals. This very question was raised in the case of The United States *vs.* Ritche, decided by the Supreme Court of the United States and reported in vol. 58, U. S. Sup. Ct. Rep., page 524. In that case the proceedings were originally commenced before a board of commissioners to settle private land claims in California under an act of Congress of March 3, 1851. Provisions were made by the act at the suit of the losing party for an appeal to the United States district court for the northern district of California. The board decided the case in favor of the claimant and against the Government. The United States appealed, in accordance with the provisions of the statute, to the aforesaid district court, where it was again tried *de novo*, and an appeal regularly taken to the United States Supreme Court. In that court the question of the jurisdiction of the district court to try the case was raised. The contention is stated in the opinion. In deciding the case the court say:

"It is also objected that the law prescribing an appeal to the district court from the decision of the board of commissioners is unconstitutional, as this board, as organized, is not a court, under the Constitution, and cannot, therefore, be vested with any of the judicial powers conferred upon the General Government.

"But the answer to this objection is that the suit in the district court is to be regarded as an original proceeding, the removal of the transcript, papers, and evidence into it from the board of commissioners being but a mode of providing for the institution of the suit in that court. The transfer, it is true, is called an appeal; but we must not, however, be misled by a name, but look to the substance and intent of the proceedings. The district court is not confined to a mere re-examination of the case as heard and decided by the board of commissioners, but hears the case *de novo* upon the papers and testimony which had been used before the board, they being made evidence in the district court, and also upon such further evidence as either party may see fit to produce."

Following this decision, I will, in these cases, proceed as if they were originally brought in this court, try them *de novo*, and give to all of the parties all of the advantages of an original suit—that is, all cases brought here in conformity with the statute.

It is, therefore, ordered by the court that the claimants to the right of citizenship in these cases may have fifteen days from this date—that is, until the — day of July, 1897—in which to take and file further proof, and that the Choctaw nation may have immediately thereafter fifteen days in which to take and file further rebuttal proof—that is, from the said — day of July, ——, until the — day of July, 1897—and that all legal testimony heretofore taken and filed with the so-called Dawes commission shall be considered as competent proof on the trial of these cases.

And that the trial of all of these cases, except such as may be disposed of otherwise, is hereby set for trial on Tuesday, the — day of ——, 1897.

These cases naturally divide themselves into six heads or classes, to wit:

1. As to the right to citizenship of those Choctaws who, under the treaty of 1830, decided to remain in the State of Mississippi, called "Mississippi Choctaws," and have not since removed into the present Choctaw nation. No appeal necessary on the part of the Choctaw nation.

2. As to the right to citizenship of those Mississippi Choctaws who have, since the treaty of 1830, removed into the present Choctaw nation. Same memo.

3. As to the right to citizenship of others who are not Mississippi Choctaws, who have removed from the Choctaw nation into the States, and are now residing there. Same memo.

4. As to the right to citizenship of white men having married Indian women, in violation of the marriage laws of the Choctaw nation. Same memo.

5. As to the right of white men to citizenship, by virtue of a legal marriage to Choctaw women, and residence in the Choctaw nation, had become lawful citizens, but their Indian wives having afterward died, they married for their second wives white women.

6. As to the right to citizenship of white men who, having married Choctaw women, in violation of the Choctaw laws, afterward remarry the same women in conformity with their laws.

There are submitted to the court for final hearing, on the proof already taken, cases involving all of the above questions, which I will now proceed to decide in the order following:

I.

JACK AMOS ET AL.
vs.
THE CHOCTAW NATION. } No. 158.

In this case the proof shows that the claimants are Choctaw Indians by blood, now living in the State of Mississippi; that neither they nor their ancestors have ever removed into the present Choctaw nation.

The claimants base their right to be enrolled as Choctaw citizens upon the terms of the second and fourteenth articles of the treaty negotiated at Dancing Rabbit creek, on September 27, 1830, and of the conditions of the patent to the lands of the Choctaw nation, executed by President Tyler in the year 1842 (Durant Ed. Choctaw Laws, page 31).

Articles 2 and 14 of the treaty of 1830 are as follows:

"Article 2. The United States, under a grant specially to be made by the President of the U. S., shall cause to be conveyed to the Choctaw nation a tract of country west of the Mississippi river, in fee-simple to them and their descendants, to inure to them while they shall exist as a nation and live on it, beginning near Fort Smith, where the Arkansas boundary crosses the Arkansas river, running thence to the source of the Canadian fork, if in the limits of the United States, or to those limits; thence due south to Red river, and down Red river to the west boundary of the Territory of Arkansas; thence north along that line to the beginning. The boundary of the same to be agreeably to the treaty made and concluded at Washington city, in the year 1825. The grant to be executed so soon as the present treaty shall be ratified.

"Article 14. Each Choctaw head of a family being desirous to remain and become a citizen of the States, shall be permitted to do so, by signifying his intention to the agent within six months from the ratification of this treaty, and he or she shall thereupon be entitled to a reservation of one section of six hundred and forty acres of land, to be bounded by sectional lines of survey; in like manner shall be entitled to one-half of that quantity for each unmarried child which is living with him over ten years of age; and a quarter section to such child as may be under 10 years of age, to adjoin the location of the parent. If they reside upon said lands intending to become citizens of the States for five years after the ratification of this treaty, in that case a grant in fee-simple shall issue; said reservation shall include the present improvements of the head of the family, or a portion of it. Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever remove, are not to be entitled to any portion of the Choctaw annuity."

The conditions of article 2 of the treaty that the land should be conveyed "to the Choctaw nation in fee-simple to them and their descendants, to inure to them while they shall exist as a nation and live on it," are carried into the patent, and are the only portions of that instrument which shed

any light on the question now being considered, and therefore article 2 and the conditions of the patent may be considered together.

The whole object of the treaty of 1830 was to procure the removal, as far as practicable, of the Choctaw people to the lands west of the Mississippi which they now occupy. The Supreme Court of the United States, in the case of The Choctaw Nation *vs.* United States, 119 U. S., 36, after reviewing the treaties of 1820 and 1825, say :

" In the meantime, however, under the pressure of the demand for settlement of the unoccupied lands of the State of Mississippi by emigrants from other States, the policy of the United States in respect to the Indian tribes still dwelling within its borders underwent a change and it became desirable, by a new treaty, to effect, as far as practicable, the removal of the whole body of the Choctaw nation, as a tribe, from the limits of the State, to the lands which had been ceded to them west of the Mississippi river. To carry out that policy, the treaty of 1830 was negotiated."

Again, in the same case, page 27, the court say :

" It is notorious as a historical fact, as it abundantly appears from the records of this case, that great pressure had to be brought to bear upon the Indians to effect their removal, and the whole treaty was evidently and purposely executed, not so much to secure to the Indians the rights for which they had stipulated, as to effectuate the policy of the United States in regard to their removal."

Article 3 of the treaty of 1830 stipulates that the Choctaws agree to remove all of their people during the years 1831, 1832, and 1833 to those lands (7 Stat. at Large, 333).

Article 14 of the treaty, however, provides for certain privileges and rights for those who might choose to remain in Mississippi with a view of becoming citizens of that State. They and their descendants were to receive certain lands, and after living on them for five years, intending to become citizens of the State, those lands were to

be granted to them in fee-simple. Then follows this very peculiar clause:

"Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever *remove*, are not to be entitled to any portion of the Choctaw annuity."

The difficulty in construing this clause of the treaty is to ascertain the meaning of the word "remove." To what does it relate and how shall we give it meaning? It certainly does not purpose to impose a penalty on the Choctaw who may choose to remove for removing, and for that reason forfeit his right to the annuity, because so long as he remained in Mississippi he was not entitled to any annuity, and therefore, by removing, he could not forfeit that which he did not have. If he removed he was to have no annuity and if he remained he was to have no annuity. It is evident, therefore, that the word was not used for the purpose of forfeiting the annuity in case of removal. Then what are its uses? The very object of the treaty was to procure a removal of these people. The whole of the Choctaw nation, with all of its sovereignty, its powers, and its duties, was to be transferred beyond the Mississippi. It was to exercise its powers, confer its privileges, and maintain the citizenship of its people in another place. Those who were left behind were to retain not this Choctaw citizenship, but only the "privileges of a Choctaw citizen"—that is, that when they put themselves into a position that these privileges could be conferred upon them they were to have them; and, under the conditions and purposes of this treaty, how would it be possible for them to put themselves in such a position without first removing within the territorial jurisdiction of the Choctaw nation and within the sphere of its powers? What privilege would it be possible for the Choctaw nation to confer or a Mississippi Choctaw to receive so long as he remained in Mississippi and out of the limits of the Choctaw nation? By the very terms of

the treaty they were to become citizens of another State, owing allegiance to and receiving protection from another sovereignty. If one Mississippi Choctaw were to commit a wrong against the person or property of another, the right would be enforced and the wrong redressed under the laws of Mississippi. The Choctaw nation would be powerless to act in such a case. The Choctaws in that State cannot vote, sit as jurors, or hold office as a Choctaw citizen or receive any other benefit or privilege as such. They cannot participate in the rents and profits of the lands of the Choctaw nation, because by the very terms of the grant the Choctaw people and their descendants must live upon them. If they do not, it is an act of forfeiture, made so by the provisions of article 2 of the treaty of 1830, and also of those of the patent to their lands, afterwards executed.

The title of the Choctaw people to their lands is a conditional one, and one of the conditions of the grant, expressed in both the second article of the treaty of 1830 and the patent, is that the grantees shall live upon them. And who are the grantees? Who are these people who are to live upon the land? Unquestionably, the Choctaw people and their descendants; for, while the grant is to the Choctaw nation, the people seem to be included, both as grantees and beneficiaries. The language of the treaty is, and it is carried into the patent:

"The President of the United States shall cause to be conveyed to the Choctaw nation, a tract of country west of the Mississippi river, in fee-simple, to them and their descendants, to inure to them while they shall exist as a nation and live on it."

The Choctaw nation is not "them" and cannot have "descendants," and while it may exercise its sovereignty and its national powers within certain defined territorial limits, it cannot "live on land." Those provisions of the grant which are expressed in the plural and attach to "descendants" and which require as a condition that the land

shall be lived on, beyond doubt, refer to the Choctaw people and their descendants. Whatever effect upon the title the limitation upon the right of alienation expressed in the patent, so that the lands cannot be sold except to the grantor or by its consent, may have, there can be no question but that the second article of the treaty of 1830, negotiated twelve years before the execution of the patent, and in which no limitation on the right of alienation is expressed, was intended to convey a fee-simple title, burdened by two conditions subsequent, the one that the grantees should continue the corporate existence of their nation, and the other that the people of that nation and their descendants should forever live upon the land. A failure of either would work a forfeiture of the title to the grantor.

Now, why was it that this fee-simple title was to be burdened by the condition that the grantee must live on the land? In the light of the knowledge of the conditions that then existed the answer is plain. The policy of the Federal Government at that time, relating to the Indian tribes, was to move them upon a reservation and keep them there, and if the Indians, either singly or in numbers should stray off, soldiers with guns and bayonets were used to drive them back. This very treaty was negotiated with the Choctaws for that very purpose. Hence the condition in the grant that they should live on the land or it should be subject to forfeiture to the United States. This condition was inserted for two reasons: First, to compel the grantees to remove upon the lands; and, second, to compel them to remain on them after removal. It was not intended that some should go and locate on the lands and hold the title for themselves and also for the others who should choose to remain. This would defeat the very object of the condition. These lands were conveyed to the Choctaw people, to be held by them as tenants in common. This intention of the second article of the treaty of 1830 is expressed by the use of the words "them and their descendants" and of the clause that they

were to "live on the land." Both of these clauses are expressed in the plural, and evidently do not relate to the nation as a corporate body. That a tenancy in common was intended is made clear by a consideration of section 3 of an act of Congress entitled "An act to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi river," approved May 28, 1830 (4 U. S. Stat. at Large, 412). The section reads as follows:

"*And be it further enacted*, That in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guaranty to them and their heirs, or successors, the country so exchanged with them; and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: *Provided, always*, That such lands shall revert to the United States if the Indians become extinct or abandon the same."

At the time the treaty of 1830 was negotiated (September 29, 1830) this act had been on the statute books of the United States for four months, and, as a matter of course, the commissioners to negotiate the treaty were familiar with it. But the language used in this act to limit the estate is "to them, their heirs or successors." The language used in the treaty to limit the estate therein granted is "in fee-simple to them and their descendants," and then conditions are attached not named in the statute. Why the word "successors" was left out of the treaty is plain. But why the word "heirs" was changed to the word "descendants," unless it was that a word should be used within the comprehension of those untutored Indians who knew nothing of the technical phrases of the common law used in the conveyance of real estate, is not easy to determine. The word "successors" was omitted from the treaty because, by its terms, the Choctaw nation was to have no successors.

They were to live on the land forever or it should be forfeited to the grantor. When the technical words "successors" and "heirs" were dropped and the common word "descendants" was used, these Indians could understand it. They knew what they and their offspring were. It was to them, the people and their children, that the land was sold, and when the condition was added that the grant was to be made to them and their descendants only in the event that they should live upon the lands they could not but understand that this implied a removal to and a continual residence upon them.

As a further evidence that the parties understood that by this transaction the land was to be held in common by the people the treaty of 1833, article 1, provides, after describing the lands, as follows:

"And, pursuant to an act of Congress, approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common, so that each and every member of either tribe shall have an equal, undivided interest in the whole. *Provided, however,* No part thereof shall ever be sold without the consent of both tribes, and that said land shall revert to the United States if said Indians and their heirs become extinct or abandon the same" (4 U. S. Stat. at Large, 276).

If this be true, there is no holding in trust by the corporate body of the Choctaw nation for the benefit of the people, but the people themselves have the title and hold it in common.

"A tenancy in common is a joint estate, in which there is unity of possession, but separate and distinct title. The tenants have separate and independent freeholds or leaseholds in their respective share, which they manage and dispose of as freely as if the estate was one in severalty. * * * The interest of one tenant in common is so independent of that of his cotenant, that, in a joint conveyance

of the estate, it would be treated as a grant to each, of his own share of the estate" (Tiedeman on Real Property, 235).

And therefore any condition of the grant would be as binding on each of the tenants in common as if the estate was in severalty and vested in the individual tenant, and therefore the condition named in the second article of the treaty of 1830 and in the patent that "they shall live on the land" is binding individually upon each and upon all of the grantees.

In the third article of the treaty the Choctaws agreed to move all of their people within three years, and the United States intended that they should go; but, by the fourteenth article of the treaty, provisions were made whereby those who should decide to remain and become citizens of the State of Mississippi in the event that because of the intolerance and persecutions of the whites which they themselves had so bitterly experienced or for any other cause might become dissatisfied with their altered conditions and their new citizenship and desired to follow them to their new homes and thereafter exercise with them in their own country the privileges of citizenship they could do so, except that they were not to participate with them in their annuities, the lands which they were to receive in Mississippi being deemed a compensation for that.

When the fourteenth article of the treaty was framed, the negotiating parties understood that the policy of the United States was that the Choctaws were to be removed. The Choctaws, in article 3, had just agreed that they should all go. The ink was not yet dry in article 2, whereby the condition was placed in this grant to the lands, that they were to live upon them or they should be forfeited, and that no privilege of citizenship could be conferred or enjoyed outside of the territorial jurisdiction of their newly located nation. Understanding these conditions, the latter clause of article 14 was penned, "Persons who claim under

this article shall not lose the privilege of a Choctaw citizen, but if they ever remove (that is, if they ever place themselves on the land and within the jurisdiction of the nation whereby those privileges may become operative) they are not to be entitled to any portion of the Choctaw annuity." In other words, if they ever remove they are to enjoy all of the privileges of a Choctaw citizen except that of participating in their annuities. If this be not the meaning to be attached to the word "remove" as used in the clause of the treaty under consideration, it must be meaningless; but, in the interpretation of statutes, it is the duty of the court to so interpret them as to give to every word a meaning, and in doing so it must take into consideration the whole statute, its objects and purposes, the rights which are intended to be enforced, and the evils intended to be remedied; it may go to the history of the transaction about which the legislation is had and call to its aid all legitimate facts proven or of which the courts will take judicial notice in order to find the true meaning of the word as used in the statute. Of course, the same rule of interpretation applies to treaties. Adopting these rules in the interpretation of article 14 of the treaty of 1830, I arrive at the conclusion that the "privilege of a Choctaw citizen" therein reserved to those Choctaws who shall remain, thereby separating themselves, it may be, forever from their brethren and their nation, becoming citizens of another sovereignty and aliens of their own, situated so that it would be impossible, while in Mississippi, to receive or enjoy any of the rights of Choctaw citizenship, was the right to renounce his allegiance to the Commonwealth of Mississippi, move upon the lands conveyed to him and his people, and there, the only spot on earth where he could do so, renew his relations with his people and enjoy all of the privileges of a Choctaw citizen except to participate in the annuities.

As an evidence that the Choctaw people themselves took this view of the question, attention is called to the fact that

their council has passed many acts and resolutions inviting these absent Choctaws to move into their country, and on one occasion appropriated a considerable sum of money to assist them on their journey, and, until the past two or three years, have always promptly placed those who did return on the rolls of citizenship, but never enrolled an absent Choctaw as a citizen.

On December 24, 1889, the general council of the Choctaw nation passed the following resolution:

"Whereas, there are large numbers of Choctaws yet in the States of Mississippi and Louisiana, who are entitled to all the rights and privileges of citizenship in the Choctaw nation; and

"Whereas, they are denied all rights of citizenship in said States; and,

"Whereas, they are too poor to immigrate themselves into the Choctaw nation: Therefore,

"*Be it resolved by the general council of the Choctaw nation assembled*, That the United States Government is hereby requested to make provisions for the emigration of said Choctaws from said States to the Choctaw nation," etc.

The language is not that they are entitled to the rights and privileges of Choctaw citizenship in the States named, but "who are entitled to all the rights and privileges of citizenship in the Choctaw nation," and the prayer is that because of the fact that they are denied the rights of citizenship in the State that the United States will remove them to a place—their own country—where the rights of Choctaw citizenship may be enjoyed by them.

As a further evidence of the fact that all of the parties to the treaty—the United States, the Choctaw nation, and the Mississippi Indians themselves—have always understood that the Mississippi Choctaws were entitled to none of the rights of a Choctaw citizen so long as they remained in that State, attention is called to the fact that the lands in Mississippi which were ceded to the United States by the

Choctaw nation by virtue of the treaty of 1830 were, under the laws of the United States, sold. The Choctaw nation claimed that they had never been paid any consideration for them, and that the United States justly owed them the net proceeds arising out of the sale. For many years this contention was carried on before the departments of the Government, commissions, and other tribunals. Finally, by treaty, it was submitted to the Senate of the United States for decision. That body found in favor of the Choctaw nation. The case then went to the Court of Claims, and from there to the United States Supreme Court, in which court judgment was finally rendered for nearly $3,000,000. This judgment was rendered in November, 1886. The money was turned over to the Choctaws by the United States, and by them, with the knowledge and consent of the United States, divided among their own people who lived in the nation. Not one farthing of it was ever paid to an absent Mississippi Choctaw, and no portion of it was ever claimed by them. During this whole litigation, running through many years, no effort was made to make themselves parties to the suit. And when the money was finally paid to the Choctaw authorities, to be divided among the people, they made no claim for any part of it, and entered no protest to its being paid to the resident Choctaws, nor have they brought suit for their share since. The other party to the treaty, the United States Government, the guardian of these Indians, paid the money over without making any provision for the Mississippi Choctaws to get their share, or intimating that anything was due them. When it is remembered that this money was the proceeds of the sale of the lands in Mississippi belonging to the united Choctaw people while they lived in that State, and that the great bulk of the Mississippi Choctaws had never received one farthing for their share in the lands, if they, living in Mississippi, are entitled there to the rights of a Choctaw citizen, it is remarkable that they did not assert their rights.

Again, a few years ago the interest of the Choctaws to lands lying west of their present boundaries was sold by them to the United States for a considerable sum of money. This, like the other, was promptly divided among the resident Choctaws with the knowledge and consent of the United States and without protest or claim of the Mississippi Choctaws. If they are entitled to the privilege of Choctaw citizens, without removing into the boundaries of the nation, they are and were entitled to their *pro rata* share of this money. If they do not understand that they have no claim to the rights of citizenship without moving into the country, why have they for the past sixty-five years silently stood by and permitted these kind of transactions to be had without claim, protest, or suit?

The Eastern band of Cherokees, now residing in North Carolina, sustained a relationship to the Cherokee nation almost identical to that sustained by the Mississippi Choctaws to the Choctaw nation. Like the Mississippi Choctaws, there were some among them who were averse to moving to their new country west of the Mississippi river. Provisions were made for them by the treaty of New Echota (the treaty of 1835) between the Cherokee nation and the United States, similar to those with the Choctaws by the treaty of 1830. When the Cherokee people moved to the present home of the Cherokees these remained behind in North Carolina, where they have ever since resided. Like the Choctaw treaty of 1830, the treaty of New Echota provided that their lands should be ceded to them and their descendants, etc. The Cherokee nation, by virtue of a treaty with the United States, afterward sold some of these lands. The Eastern band of Cherokees in North Carolina, unlike their Mississippi Choctaw brethren, promptly demanded their *pro rata* of the proceeds of this sale, and, upon being denied, at once sought and obtained permission of the United States to sue the Cherokee nation in the Court of Claims for this money, and also in the same suit to

sue for another fund, which was created by the treaty of New Echota, consisting of certain annuities in the sum of $214,000, of which the Eastern band of Cherokees claimed a *pro rata* share. The suit was brought, and the Court of Claims, in a very elaborate and learned decision, decided against the right of the Eastern band of Cherokees to recover, upon the ground that those Cherokees, by the act of remaining in North Carolina, had alienated themselves from the Cherokee nation to such an extent that they could not claim any of the rights of a Cherokee citizen without moving into the Cherokee nation, and there being readmitted in accordance with the constitution and laws of that nation. The case was appealed to the Supreme Court of the United States, and there the decision of the Court of Claims was affirmed (Eastern Band of Cherokees *vs.* United States, 117 U. S., 288). In that case the Supreme Court, after reviewing all of the treaties and statutes relating to the matter, concluded by saying:

"If Indians in that State (North Carolina) or in any other State east of the Mississippi, wish to enjoy the benefits of the common property of the Cherokee nation, in whatever form it may exist, they must, as held by the Court of Claims, comply with the constitution and laws of the Cherokee nation, and be readmitted to citizenship as there provided. They cannot live out of its territory, evade the obligations and burdens of citizenship, and at the same time enjoy the benefits of the funds and common property of the nation. Those funds and that property were dedicated, by the constitution of the Cherokees and were intended by the treaties with the United States, for the benefit of the united nation, and not in any respect for those who had separated from it and become aliens to their nation. We can see no just ground on which the claim of the petitioners can rest in either of the funds held by the United States in trust for the Cherokee nation."

It seems to me that this decision of the Supreme Court, founded on a case so nearly similar to the one at hearing,

conclusively settles the contention in favor of the Choctaw nation. Indeed, in that case, the Supreme Court expresses a very strong intimation that those provisions of the treaty of New Echota relating to and providing for those Cherokees who should refuse to move west were confined in their operation to that class of Cherokees then *in esse*, and the rights conferred by those provisions of the treaty did not descend to their offspring; that the descendants of those Cherokees did not succeed to the rights of their ancestors under the treaty. The language of the Supreme Court is:

"Nor is the band (Eastern band of Cherokees), organized as it now is, the successor of any organization recognized by any treaty or law of the United States. Individual Indians who refused to remove west and preferred to remain and become citizens of the States in which they resided, were promised certain moneys, but there is no evidence that the petitioners have succeeded to any of these rights. The original claimants have probably all died, for fifty years have elapsed since the treaty of 1835 was made, and no transfer from them to their legal representatives is shown" (*ib.*, 310).

The court proceeds, however, to decide this case, as heretofore shown, on the ground that the Indians composing the Eastern band of Cherokees had not removed into the Cherokee nation and reassumed their citizenship under the constitution and laws of that nation.

I am disposed to the opinion, however, and will so hold that the descendants of the Mississippi Choctaws, by virtue of the fourteenth article of the treaty of 1830, are entitled to all of the rights of Choctaw citizenship, with all of the privileges and property rights incident thereto, provided they have renounced their allegiance to the sovereignty of Mississippi by moving into the Choctaw nation in good faith to live upon their lands, renewing their allegiance to that nation, and putting themselves in an attitude whereby they will be able to share in the burdens of their Govern-

ment. The reason for this conclusion is, to my mind, made morally certain when it is remembered that ever since the treaty of 1830, now for the period of nearly sixty-seven years, with the exception of the past two or three years, the Choctaw nation, by its legislative enactments and by its acts, so long continued that by custom they have become crystallized into law, have universally admitted all who should remove to this country and rehabilitate them in all of the rights and privileges of citizenship enjoyed by themselves.

The counsel for the claimants lay considerable stress on the effect of the provisions of article 13 of the treaty of 1866 between the United States and the Choctaw nation (14 Stat. at Large, —).

By the eleventh and twelfth articles of that treaty a scheme was devised by which the lands of the Choctaw and Chickasaw nations were to be surveyed and divided and allotted to the individual Indians, provided the councils of the respective nations should agree to it, which, however, they have refused to do. A land office was to be established at Boggy Depot, in the Choctaw nation. When all of the surveys were completed maps thereof were to be filed in the said land office, subject to the inspection of all parties interested, and immediately thereafter notice of such filing was to be given for ninety days, calling upon all parties interested to examine said maps, to the end that errors in the location of occupancies, which were to be noted on the maps, might be corrected. Then followed article 13 of the treaty, which is as follows:

"Article 13. The notice required in the above article shall be given, not only in the Choctaw and Chickasaw nations, but by publication in newspapers printed in the States of Mississippi and Tennessee, Louisiana, Texas, Arkansas and Alabama, to the end that such Choctaws and Chickasaws as yet remain outside of the Choctaw and Chickasaw nations may be informed and have opportunity to exercise the rights hereby given to resident Choctaws and Chickasaws. *Provided*, That before any such absent Choctaw or Chicka-

saw shall be permitted to select for him or herself, or others, as hereinafter provided, he or she shall satisfy the register of the land office of his or her intention, or the intention of the party for whom the selection is to be made, to become *bona fide* resident in the said nation within five years from the time of selection. And should the said absentee fail to remove into said nation and occupy and commence an improvement on the land selected within the time aforesaid, the said selection shall be cancelled, and the land shall thereafter be discharged from all claim on account thereof."

From an examination of this article of the treaty it will be seen that the Choctaws and Chickasaws recognized the right of absent members of their nations to participate in the allotment and the subsequent ownership of their lands to the same extent as they themselves enjoyed, but on conditions, however, first, that they should satisfy the register of the land office of their intention to become *bona fide* residents in the said nation within five years from the time of said selection; and, second, that within the said five years they should actually remove into the said nation; here is a statute of limitation; and, third, that within the said five years they should occupy and commence an improvement upon the selected lands.

It will be observed that this latter clause imposes a condition on absent Indians nowhere required of the resident ones by any clause of the treaty. They were required to remove into the country and show their good faith and their intention to remain *bona fide* citizens of the nation by actual occupancy of the land and an expenditure of money in its improvement. The notice was to be given them in order that they might have an opportunity of removing into the nation and there residing and resuming their rights as citizens; but care was to be taken and safeguards provided by which their removal was to be actually had, and that it was to be done in good faith: First, the register of the land office was to be convinced, by such proof as might satisfy him, of the intention of the absent Indian to become a *bona fide*

resident of the nation before he was allowed to make a selection; and, second, that was to be followed by an actual occupancy and improvement of the land, and if he failed in this it worked a forfeiture of his rights. Nowhere within the whole treaty is any right recognized or conferred on an absent Indian, except on the condition that he shall remove into the nation, and the right is not to be consummated or enjoyed until after actual removal. No treaty or act of the Choctaw council or of any officer of the Choctaw nation since the treaty of 1830 can be cited, or at least I have not found them, whereby any right or privilege has been conferred, granted, or recognized in or to a Mississippi Choctaw so long as he shall remain away from his people, but there are an infinitude of such acts and conduct granting and recognizing such rights and privileges to him after he shall have removed.

The provisions of the treaty of 1866, so far from being an authority in favor of the contention of claimants, seems to me to be strongly against them.

To permit men with, perchance, but a strain of Choctaw blood in their veins, who, sixty-five years ago, broke away from their kindred and their nation and during that time or the most of it have been exercising the rights of citizenship and doing homage to the sovereignty of another nation, who have borne none of the burdens of this nation and have become strangers to the people, to reach forth their hands from their distant and alien home and lay hold of a part of the public domain, the common property of the people, and appropriate it to their own use, would be unjust and inequitable.

It is therefore the opinion of the court that absent Mississippi Choctaws are not entitled to be enrolled as citizens of the Choctaw nation.

The action of the Dawes commission is therefore AFFIRMED, and a decree will be entered for the Choctaw nation.

II.

E. J. HORNE
vs.
THE CHOCTAW NATION. } No. 11.

In this case the pleadings and proof show that the claimant is a Mississippi Choctaw, and that prior to his application to be enrolled he had in good faith moved into the Choctaw nation, and on the 9th day of September, 1896, filed with the Dawes commission his application to be enrolled as a Choctaw citizen; that he is a Choctaw by blood.

The act conferring jurisdiction on the commission to negotiate with the five civilized tribes, called the "Dawes commission," entitled "An act making appropriation for current and contingent expenses of the Indian Department, etc.," approved June 10, 1896 (Stat. at Large, 1895–'6, page 339), among other things provides that "every application for citizenship must be made to the commission within three months after the passage of the aforesaid act;" and therefore, the claimant in this case having complied with that provision of the statute, and being a "Mississippi Choctaw," and having returned to the Choctaw nation in good faith, under the rule laid down in the decision just rendered in the case of Jack Amos *et al. vs.* Choctaw Nation, he is entitled to be enrolled as a Choctaw citizen, unless the fact that he is a Choctaw of less than one-eighth blood shall deprive him of that right.

On November 5, 1886, the following act of the Choctaw council was approved and went in force:

"AN ACT entitled An act defining the quantity of blood necessary for citizenship."

"SEC. 1. *Be it enacted by the General Council of the Choctaw nation assembled*; That hereafter all persons, non-citizens of the Choctaw nation, making or presenting to the

general council, petition for rights of Choctaws in this nation, shall be required to have one-eighth Choctaw blood, and shall be required to prove the same by competent testimony.

"SEC. 2. *Be it enacted*, That all applicants for rights in this nation shall prove their mixture of blood to be white and Indian.

"SEC. 3. *Be it further enacted*, That no person convicted of any felony or high crime shall be admitted to the rights of citizenship within this nation.

"SEC. 4. *Be it further enacted*, That this act shall not be construed to affect persons within the limits of the Choctaw nation, now enjoying the rights of citizenship.

"SEC. 5. *Be it further enacted*, That this act shall take effect and be in force from and after its passage" (Durant Digest, p. 266).

By the fourteenth article of the treaty between the United States and the Choctaw nation, negotiated on the 27th day of September, 1830, as interpreted by this court in the aforesaid case of Jack Amos *et al. vs.* The Choctaw Nation, all Misssissippi Choctaws and their descendants were entitled, upon their removal to the Choctaw nation, to all of the privileges of a Choctaw citizen, except to the right to participate in their annuities. This right of citizenship being conferred by the treaty, no law afterward enacted by the Choctaw council can deprive them of that right, because it would be in conflict with the treaty which confers that right to them and their descendants without reference to the quantity of Indian blood. If they are descendants of Choctaw ancestors, it is sufficient. As to them, therefore, the law does not apply.

In this case the claimant is entitled to be enrolled as a Choctaw citizen. The decision of the Dawes commission is and judgment will be entered for the claimant.

III.

SIDNEY J. CUNDIFF
vs.
THE CHOCTAW NATION. } No. 109.

The proof in this case shows that the claimant is a Choctaw Indian by blood; that on the 1st day of January, 1887, he moved from the Choctaw nation into the State of Texas, where he has ever since resided and still resides. On the 7th day of September, 1896, he filed his application for citizenship with the Dawes commission. The case is regularly appealed to this court.

The question in this case is, Can a Choctaw Indian who has moved off of the Choctaw lands and into one of the States, where he now resides, be placed upon the rolls of Choctaw citizenship without first removing into the Choctaw nation and upon their lands?

The very object of the treaty of 1830, between the Choctaws and the United States (7 Stat. at Large, p. 333), was to secure the removal of the Choctaw people to the lands they now possess west of the Mississippi river. So held by the Supreme Court of the United States in the case of The Choctaw Nation *vs.* The United States, 119 U. S., 36–'7. By the second article of that treaty granting the lands now held by the Choctaw nation to them, as well as by the terms of the patent afterward executed by the United States, two conditions subsequent were attached to the grant; one that the Choctaw people shall thereafter continue to exist as a nation, and the other that they shall live upon the land.

In the case of Jack Amos *et al. vs.* Choctaw Nation, decided at the present term, it was held that the condition that they should live on the land applied to the Choctaw people individually, as well as collectively. It was attempted to be shown in that case, and I think successfully, that the object of this condition was to prevent these Indians

from straying away from their lands by imposing a forfeiture of the title as to all who should do so: that the individual Indian must himself live on the land; that one of the effects of this condition is to prevent the holding of the lands by an Indian in actual possession for others out of possession, as can be done in ordinary tenancy in common when there are no conditions attached to the grant; that the Choctaw people being tenants in common of the land, as declared by the eleventh article of the treaty of 1866 between the United States and the Choctaw nation (14 Stat. at Large,—), any conditions of the grant would be binding on each of the tenants individually; and therefore, if any Choctaw after having once moved on the land should afterward abandon it or move off of it and live elsewhere, this would be a breach of the condition—such a one as would work a forfeiture to the title.

But there is another condition to the grant, set out both in the second article of the treaty of 1830 and of the patent. It is that these grantees, these tenants in common, shall not only live on the land, but they shall exist as a nation or their title shall be forfeited. Now, each one of these tenants in common possesses all of the rights and is entitled to all of the privileges and is required to perform all of the duties relating to the land that each of the others is entitled to and must perform, and therefore, if one shall be allowed to abandon the land or cease to live on it, each and all of the others may do the same thing; and if they should exercise the same right and move off of the land and out of the nation, what would become of its existence? The individual Choctaw who moves away from his people, abandons their lands, and separates himself from the sphere of their political organization as a nation is not performing his part of the condition that these people shall "exist as a nation." He is also violating the very object of the treaty and the policy of the Federal Government, as well as of his own.

In my opinion, as long as he remains away from the na-

tion and the lands, under these circumstances, he forfeits his right to that citizenship which he has abandoned and which carries with it the right to the land; that the Choctaw nation, in the exercise of its sovereign power, has the right to refuse to place him on its rolls of citizenship.

In the language of the Supreme Court of the United States, in the case of The Eastern Band of Cherokees *vs.* United States, 117 U. S., 331:

"They (the Indians) cannot live out of its (the nation's) territory, evade the obligations and burdens of citizenship, and at the same time enjoy the benefits of the fund and common property of the nation."

It cannot be disguised that these Indians who are living away from the nation in the States and are now seeking to be enrolled without removing upon their lands are doing so for the purpose alone of sharing with those who, true to their treaty obligations, have remained, the land in this nation which they expect soon to be allotted, and it is possibly true that the object of the Government in causing these rolls to be made is that they shall be used as a basis of allotment. To allow these Indians who have abandoned their lands and their people, who have and do refuse to perform the duties of Choctaw citizenship, without any intention on their part to resume their relations with their people, to remain away in violation of every duty of citizenship and against the very terms of the deed to the lands which they now seek to possess themselves of, without performing the conditions, is not just and it is not the law.

As to all such Indians who may have, in good faith, returned to the Choctaw nation with the intention of resuming their relations of citizenship, I think they are entitled to do so, unless the Choctaw statute of November 6, 1886 (Durant's Dig., 266), has the effect of disqualifying from that date all of those who may have less than one-eighth Choctaw blood. This question I do not now decide.

The court is therefore of the opinion that the claimant in this case is not entitled to enrollment, and the action of the Dawes commission is affirmed, and judgment for the Choctaw nation.

IV.

W. R. SENTER
vs.
THE CHOCTAW NATION. } No. 234.

The facts of this case, as found by the master in chancery and not excepted to, are as follows:

That claimant, a white man, was married December 25, 1889, in the State of Texas, according to the laws of that State, to a registered Choctaw woman by blood, and that he is a resident of the Choctaw nation, but that he was not married in conformity with the Choctaw laws relating to marriage.

The question in this case is: Is this marriage to this Indian woman, followed by a residence in the nation, so far valid as to confer upon the white husband the rights of citizenship in the Choctaw nation?

Article 38 of the treaty of 1866 (14 Stat. at Large, —) is as follows:

"Every white person who, having married a Choctaw or Chickasaw, resides in said Choctaw or Chickasaw nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws of the Choctaw and Chickasaw nations, according to his domicile, and to prosecution and trial before their tribunals and to punishment according to their laws, in all respects as though he was a native Choctaw or Chickasaw."

At the time of the negotiation and ratification of the treaty of 1866 the following act of the Choctaw nation approved October, 1840, was in force in that nation, to wit:

"AN ACT in relation to white men marrying in the nation, etc.

"SEC. 4. *Be it enacted by the General Council of the Choctaw nation assembled:* That no white man shall be allowed to marry in this nation, unless he has been a citizen (evidently meaning a resident) of this nation for two years.

"*And be it further enacted,* That he shall be required to procure a license from some judge or the district clerk and be lawfully married by a minister of the gospel, or some other authorized person, before he shall be entitled and admitted to the privileges of citizenship.

"*And be it further enacted,* Should any officer or minister of the gospel who are authorized by law to marry in this nation, perform such marriage ceremony not agreeable to this act, shall be made to pay a fine of one hundred dollars for each offence, and the money shall be put into the district treasury in which said marriage ceremony may have taken place.

"*And be it further enacted,* That no white man who shall marry a Choctaw woman shall have the disposal of her property without her consent and any white man parting from his wife without just provocation, shall forfeit and pay over to his wife such sum or sums as may be adjudged to her by the district court for said breach of the marriage contract, and be deprived of citizenship."

Of the four clauses in the above act the last is the only one that is in conflict with the provisions of the treaty above cited. The treaty provides that the marriage and residence in the Choctaw nation shall place the married man in every respect as if he were a native Choctaw. The last clause of the act puts him in a different attitude than that of the Indian. There was no law of the Choctaw nation at that time providing that the penalty therein mentioned should be imposed on an Indian by blood for deserting his wife, and therefore, if the act should stand, the white married man would not be situated in all respects as a native Choctaw; hence there is a conflict between the treaty and the act, and of course the provisions of the treaty must prevail; and

therefore so much of the act as is contained in this last clause must be considered as having been repealed by the treaty. But I observe no reason why the other three clauses of the act should not stand unrepealed as the law in force in the Choctaw nation until some other act of the council or treaty shall have repealed it.

There was another act of the Choctaw council relating to white men marrying Indian women, in force at the time of the ratification of the treaty of 1866, to wit:

"SEC. 15. *Be it enacted by the General Council of the Choctaw nation assembled:* That every white man who is living with Indian woman in this nation without being lawfully married to her, shall be required to marry her lawfully, or be compelled to leave the nation.

"*Be it further enacted*, That no white man who is under a bad character will be allowed to be united to an Indian woman in marriage in this nation under any circumstances whatever. (Approved Oct., 1849.")

Surely this most salutary act was not in conflict with the treaty. It required, as does the act now in force to be presently cited, that the white man should be of good character before he could marry one of their Indian women, and thereby secure the right of citizenship in their nation.

After the ratification of the treaty of 1866, on the — day of ——, 1875, the following act was passed by the Choctaw council and approved by the governor:

"1. *Be it enacted by the General Council of the Choctaw nation assembled:* Any white man, or citizen of the United States, or of any foreign government, desiring to marry a Choctaw woman, citizen of the Choctaw nation, shall be and is hereby required to obtain a license for the same from one of the circuit clerks or judges of a court of record, and make oath or satisfactory showing to such clerk or judge, that he has not a surviving wife from whom he has not been lawfully divorced; and unless such information be freely furnished, to the satisfaction of the clerk or judge, no license shall issue; and every white man or person applying for a license as herein provided, shall, before obtaining the same,

be required to present to the said clerk or judge, a certificate of good moral character, signed by at least ten respectable Choctaw citizens by blood, who shall have been acquainted with him at least twelve months immediately preceding the signing of such certificate; and before any license as herein provided shall be issued, the person applying shall be and is hereby required to pay to the clerk or judge the sum of twenty-five dollars, and be also required to take the following oath: 'I do solemnly swear that I will honor, defend and submit to the constitution and laws of the Choctaw nation, and will neither claim nor seek from the United States Government, or from the judicial tribunals thereof, any protection, privilege or redress, incompatible with the same as guaranteed to the Choctaw nation by the treaty stipulations entered into between them, so help me God.'

"2. Marriages contracted under the provisions of this act shall be solemnized as provided by the laws of this nation, or otherwise shall be void.

"3. No marriage between a citizen of the United States, or of any foreign nation, and a female citizen of this nation, entered into within the limits of this nation, except as hereinbefore authorized and provided, shall be legal, and every person who shall engage and assist in solemnizing such marriage shall, upon conviction, be fined fifty dollars, and it shall be the duty of the district attorney in whose district such person resides to prosecute such person before the circuit court, and one-half of all fines arising under this act shall be equally divided between the sheriff and the district attorney.

"4. Every person performing the marriage ceremony under the authority of a license provided for herein, shall be required to attach a certificate of marriage to the back of the license, and return it to the person in whose behalf it was issued, who shall, within thirty days therefrom, place the same in the hands of the circuit clerk, whose duty it shall be to record the same and return it to the owner.

"5. Should any man or woman, a citizen of the United States, or of any foreign country, become a citizen of the Choctaw nation by intermarriage, as herein provided, and be left a widow or widower, he or she shall continue to enjoy the rights of citizenship; unless he or she shall marry a white man or woman or person as the case may be, having no rights of Choctaw citizenship by blood; in that case all

his or her rights acquired under the provisions of this act shall cease.

"6. Every person who shall lawfully marry, under the provisions of this act, and afterwards abandon his wife or her husband, shall forfeit every right of citizenship, and shall be considered an intruder, and removed from this nation, by order of the principal chief."

It is contended that this act is in violation of the treaty, because no forms or ceremonies of marriage or conditions are in the treaty prescribed, and hence any marriage to a Choctaw, if legal where made, must be held to be a legal marriage in the Choctaw nation, and therefore must carry with it the right to Choctaw citizenship—that is, a marriage in Texas, solemnized as provided by its laws, being a legal marriage there, is, by the law, a legal marriage everywhere, and therefore a legal one in the Choctaw nation, which, by the terms of the treaty, carries with it Choctaw citizenship. Is this contention correct?

The fifth and sixth sections of the act relate to conditions that may arise after the marriage, and therefore have nothing to do with the question now being considered, and, for the purposes of this case, may be discarded.

The first section of the act provides that a white man, before he will be permitted to marry an Indian woman, must procure from the proper officer a marriage license, and, before obtaining the license, he must show, by his own oath or other satisfactory proof, that he has not a surviving wife from whom he has not been lawfully divorced; he shall further be required to present to the officer a certificate of good moral character, signed by at least ten respectable Choctaw citizens by blood, who shall have been acquainted with him at least twelve months; he is further required to pay a fee of $25 (afterward changed to $100 by act of council approved November 10, 1887), and, finally, he is required to take an oath of allegiance to the Choctaw nation. The above-cited provisions are all of the requirements of

the act, so far as the white man is concerned, relating to the marriage. The ceremony of the marriage may be performed by any person and in any manner known to the law. All that is required is:

"1. That no white man having a living wife shall impose himself upon their women and live a bigamous life with them.

"2. That they shall be of good moral character.

"3. That they shall pay the fee for the license; and,

"4. That they shall, before being naturalized, take the oath of allegiance."

There is not a provision in it that is not required by every civilized nation on earth, under similar circumstances, both as relating to the marriage and to the naturalization. Is it possible that by mere inference, because the treaty is silent as to the ceremonies or as to the place of the marriage, that a tribe of Indians is to be deprived of the right to inquire into the character of strangers and aliens who seek to marry their daughters, and through this method to become their fellow-citizens and equally share with them their lands and property? Are they to be deprived of the right to require of these aliens the poor pittance of an oath binding them to their allegiance? If this is true, what becomes of the sovereignty of the Choctaw nation? Every sovereign power has the right to pass upon the qualifications of its own citizens and to prescribe terms for those who seek citizenship with them. It is said that the Choctaw nation is a limited and a dependent sovereignty; but it is only limited and dependent in so far as its powers are circumscribed by the Constitution, laws, and treaties of the United States.

By the seventh article of the treaty of 1855, which is still in force, it is provided that—

"So far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the

Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and the full jurisdiction over persons and property within their respective limits; excepting, however, all persons, with their property, who are not, by birth, adoption or otherwise, citizens or members of either the Choctaw or Chickasaw tribe."

This provision of the treaty seems to give to the Choctaws and Chickasaws the right to regulate marriage and prescribe all reasonable rules relating to the naturalization of white men in this country. These are the most simple and common, as well as the most necessary, attributes of sovereignty, and so essential to the virtue and welfare of the Commonwealth that they ought not to be construed away from this Indian tribe, except upon the most positive and certain terms of the law.

If a white man, about to marry a Choctaw woman in good faith, intends to become a citizen of the nation, why should he object to conforming to the requirements of this statute, which in its demands are so simple, so just, and so easily performed? Is it because he is unable to make oath or to otherwise prove that he has not a living wife, or that he is unable to prove his good character, or that he is too poor to pay a license fee which is to procure for him a wife and purchase for him an undivided share in all of the lands of the Choctaw nation equal to that of any Choctaw in it? Or is it because he does not care to take the oath and make himself a Choctaw citizen that he may by the laws and customs of the Choctaw nation live on and enjoy their lands in the home of his Choctaw wife and children without submitting himself to their laws; that he may have all of the benefits of the usufruct of the Indian lands and United States citizenship combined?

When it is remembered that this law has been a public statute for twenty-two years past, and during all of that time the decision of every court having jurisdiction over this country has constantly and persistently been that the Choc-

taw statute was valid and not in conflict with the treaty, and that the law in this jurisdiction for all of that time has been enforced by the courts upon that theory, the people, by public statute and by the judgment of the courts, having had full notice of the condition, it would seem strange, indeed, that any man, under these circumstances, whose purpose it was by this method to become an Indian, who intended to abandon his United States citizenship and become a Choctaw, would refuse to follow the statute and do those things, so simple and so plain, which the courts were proclaiming he must do. A marriage of a white man to a Choctaw Indian under these circumstances, without conforming to the requirements of the Choctaw statute, is the very strongest evidence of the fact that the man did not intend to become a Choctaw citizen, but that he did intend to retain that of his own country and race. As the laws were all along being administered, that was the effect of such a marriage. It will not do to say that the common people upon the subject of the law were wiser than the courts; that these men who were marrying Choctaw women knew all the time that the statute was void, and that the courts were in error, and they would marry in accordance with their own superior views, and wait until some wiser judge should take the bench and give a more proper exposition of the law. Of course, by these unlawful marriages they did not intend to become Choctaw citizens; their very object in marrying in this way was to avoid that very thing. I am not criticising them for marrying thus. The marriage was good, so far as the marriage relations between them and their wives and the legitimacy of their children were concerned, but it did not change their citizenship. They did not want it to make them Choctaws. This was the thing they were trying to avoid, and can it be said that without any intention to become a citizen, without any renunciation of his allegiance to his old sovereignty or any oath of fidelity to the new, and against his will at

the time it was solemnized, this marriage shall make him a Choctaw citizen?

Not only have the courts at Paris, Texas, and at Fort Smith, Arkansas, which, so far as the United States was concerned, for so long a time exercised exclusive jurisdiction over the Choctaw and Chickasaw nations, decided the law in accordance with this view, but the statutory law of the United States recognizes the validity of these Indian statutes relating to marriage. The act of May 2, 1890, extending and enlarging the jurisdiction of the United States court for the Indian Territory (Sup. Rev. Stat., vol. 1, p. 737, sec. 38), after granting to the clerk and deputy clerks of the said court the right to issue marriage license and certificates and to solemnize marriages in the Indian country, and extending the marriage laws of Arkansas over the said country, provides:

"That said chapter 103 of said Laws of Arkansas (the marriage law) shall not be construed so as to interfere with the operation of the laws governing marriage, enacted by any of the civilized tribes, nor to confer any authority upon any officer of said court to unite a citizen of the United States in marriage to a member of any of the civilized nations, until the preliminaries to such marriage shall have first been arranged according to the laws of the nation of which said Indian is a member:

And provided further, That when such marriage is required by law of an Indian nation to be of record, the certificate of such marriage shall be sent for record to the proper officer, as provided in such law enacted by the Indian nation."

Here is a direct recognition of the validity of the Choctaw statute by the United States through its laws enacted by Congress. Surely, the reason why the clerk of this court is not allowed by law to marry a white man to a Choctaw woman without it shall be in accordance with Choctaw law is because, in the judgment of Congress, it was necessary to the validity of the marriage, so far as to confer on the man

citizenship in the Choctaw nation. It is a statutory recognition of the sovereignty of these civilized nations, to the extent that they may control their own marriage and naturalization laws, as they should do.

In the case of Nofire *vs.* United States (116 U. S., 657) this question is inferentially, if not fairly, decided in favor of the validity of these Indian marriage statutes. The Cherokee statute is similar to the one under consideration. The case went up to the Supreme Court of the United States from the United States circuit court at Fort Smith, Arkansas. Judge Parker decided that because the party claimed to have been murdered by Nofire had not married his wife, a Cherokee Indian, in accordance with the Cherokee law, he was not a citizen of the Cherokee nation, he being a white man. Judge Parker had held that because the license to marry had been issued by a son of the clerk, who was not a deputy clerk, but was performing the duties of one, the license was issued without authority, and that therefore the marriage was void; but the supreme court differed with the judge of the circuit court, and held that the son of the clerk, acting as he did, as to those who dealt with him, was *de facto* clerk, and as to them his acts were valid, and therefore the man had been married in accordance with the Cherokee laws, which made him a Cherokee, and ousted the jurisdiction of the United States courts over him. While it is true that in that case the question was not directly raised before the court, yet the whole opinion concedes and the argument is made on the theory that marriage in accordance with the Indian statute was necessary to confer citizenship.

It is argued that if a white man marry an Indian woman in one of the States, in accordance with the law of that State, that it is a valid marriage there, and, by the well-known principle of the law that a marriage valid where contracted is valid everwhere, it must be valid in the Choctaw nation. The principle is conceded, but the effect of such a marriage in the State is only to create the relation of man and wife,

legitimatize the offspring, and give to him such control over the wife's property as the law of the State prescribes. Such rights he carries with him wherever he may go, because they are personal; they affect nobody but the man and his wife; he can carry them with him; they do not attempt to interfere with the political, civil, or property rights of others, But if the effect of such a marriage is to be given to it as is claimed here, it would decitizenize a citizen of the United States, making of him a citizen of a foreign country and a tenant in common with each and all of the people of that nation to every foot of land they own, and this, too, over the protest and against the laws of the foreign nation. No investigation into the character and fitness of the man to become a citizen is had, nor is any oath, binding him to his allegiance, administered. He may be the veriest vagabond that trod the earth, and can turn traitor to his adopted country without violating any promise of allegiance made by him. Surely such unusual and important incidents connected with the marriage, affecting as they do the political, civil, and property rights of others, cannot be said to be a part of such marriage. He carries with him into other countries only such marital rights as are conferred on him by the laws of the State where married and as are recognized by the civilized world as pertaining to the marital relation and such as affect only the parties to the marriage and their issue; and such rights, and such rights only, a white man who may marry a Choctaw woman in one of the States, in violation of the Choctaw laws, carries with him to the nation when he goes into it with his Indian wife; and such rights the Choctaws have always recognized; they allow the woman to retain her citizenship; the issue of the marriage is held to be legitimate, and the husband may live upon and cultivate their lands, by virtue of the title of his wife and children, and enjoy all of the marital rights to the full extent that they could have been enjoyed in the State where he was married as

elsewhere in the civilized world. The rule of the law that "a marriage valid where consummated is valid everywhere" is not violated by holding that the marriage of an Indian woman by a white man, in violation of the Indian laws, in one of the States does not confer upon him those rights of citizenship and of becoming vested to a title as tenant in common of the lands of the nation which a valid marriage, under the Choctaw laws, would confer.

The court is of the opinion, therefore, that in order to confer the right of citizenship by marriage in the Choctaw nation the marriage must be a valid one under the provisions of the Choctaw laws.

Hence in this case the claimant is not entitled to be enrolled as a citizen of that nation. The action of the Dawes commission in placing him on the said rolls is reversed, and the Choctaw nation may have judgment.

V.

F. R. ROBINSON
vs.
THE CHOCTAW NATION.

The facts of this case are that the claimant, F. R. Robinson, is a white man; that on the 21st day of September, 1873, in the Choctaw nation and according to their laws, he married a Choctaw woman by blood, a recognized citizen of the Choctaw nation; that the said Indian wife died on the 21st day of April, 1884, and on August 10, 1884, claimant married a white woman, not a citizen of the Choctaw nation.

By the fifth section of the act of the Choctaw council approved November 9, 1875 (Durant Dig., 226), it is enacted:

"Should any man or woman, a citizen of the United States, or of any foreign country, become a citizen of the Choctaw nation by intermarriage as herein provided, and be left a widow or widower, he or she shall continue to enjoy the

rights of citizenship; unless he or she shall marry a white man or woman or person as the case may be, having no rights of Choctaw citizenship by blood, in that case all his or her rights acquired under the provisions of this act shall cease."

The thirty-eighth article of the treaty of 1866 (14 Stat. at Large, —) provides:

"Article 38. Every white person who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws of the Choctaw and Chickasaw nations, according to his domicile, and to prosecution and trial before their tribunals, and to punishment according to their laws, in all respects as though he was a native Choctaw or Chickasaw."

The question is, Do the Choctaw statute and the treaty conflict? If so, the statute must yield to the treaty, and the marriage is legal. If not, they both must stand, and the marriage, being in violation of the statute, is void.

At the hearing the question was argued that, the first marriage having been solemnized before the enactment of the statutes, the rights of the claimant became vested by that act, and therefore it was contended that, although the second marriage was after the statute became a law, it could not divest the claimant of those rights which had been conferred upon him before the passage of that act. But the view I take of the legality of this statute relieves me of the necessity of deciding this point.

The treaty makes every white man who may marry a Choctaw or Chickasaw woman a citizen, to use the language of the last words of article 38, above set out, "in all respects as though he was a native Choctaw or Chickasaw." By this provision of the treaty there is to be no difference between a citizen by virtue of his marriage and a native Choctaw. They are to enjoy equally and alike all of the benefits

of Choctaw citizenship, as well as share the burdens. Any act, therefore, of the Choctaw council passed after the ratification of the treaty which makes a distinction between them, granting to one greater privileges or rights or imposing on him more burdens than the other, or which shall undertake to enlarge or curtail the rights and privileges which flow from citizenship as to the one and not as to the other, would be in violation of this provision of the treaty, and therefore void. An act which puts the white man in any respect in a different attitude or condition than the Indian is void.

The Choctaw statute undertakes to deprive the white man who shall lose his Indian wife and afterward marry a white woman of all of the rights of citizenship. The marriage had vested a title to the lands in him. This is to be divested from him, and he is thereafter to be considered an intruder, subject to be removed from the country under the intercourse laws of the United States. This, too, notwithstanding the fact that his children, the issue of his Indian marriage, are Indians by blood and entitled to remain.

Now, unless a marriage of a native Indian to a white woman, after his Indian wife shall have died, has the same effect on him—that is, decitizenizes him, divests him of all title to the Choctaw lands, and deprives him of the right to live in the country—the statute works an inequality, and the white man does not enjoy the same privileges as the native Indian. The citizenship is different, and the rights flowing therefrom are not the same. The one may do an act that the other cannot do; the one has a privilege—that of marrying a white woman—that the other does not enjoy. The important right of unrestricted selection of a wife, enjoyed by the native Indian, is denied the white citizen by marriage, and therefore the provision of the statute, being in conflict with the treaty, is absolutely void, and it makes no difference whether the first marriage was before or after

the enactment of the statute. Of course, the latter marriage must be in accordance with the laws of the Choctaw nation.

I therefore find that the claimant is entitled to be enrolled. I hold also that the offspring of such a marriage would be entitled to be enrolled. The father being a lawful citizen, his children would follow his citizenship and by inheritance take any property rights he may have acquired thereby; but I do not think that the commissioners who negotiated the treaty ever contemplated that it should extend further and enable a white man whose Indian wife should have died to be in a condition that by his second marriage to a white woman he could, by virtue of such marriage, confer on his white wife citizenship so far that in case of his death she might remarry and confer on her white husband and her children by her second marriage the rights of Choctaw citizenship.

The action of the Dawes commission in enrolling the claimant is affirmed. Judgment for claimant.

VI.

WM. N. TUCKER
vs.
CHOCTAW NATION.

The facts of this case are that the claimant on the 16th day of February, 1893, at South McAlester, in the Choctaw nation, under a license of the clerk of the United States court for the Indian Territory, at that place, married a Choctaw woman; that in the solemnization of the said marriage he in nowise conformed with the provisions of the Choctaw statute relating to marriage between white persons and Indians. Afterward, learning that said marriage did not confer on him the right to become a citizen of the Choctaw nation, he remarried the same woman in accordance with the provisions of their laws.

The question is, under the circumstances, was the second marriage lawful, in so far as to confer on the claimant the right of Choctaw citizenship? The second section of the Choctaw statute relating to intermarriage (Durant Dig., 226) provides as follows:

"Marriages contracted under the provisions of this act shall be solemnized as provided by the law of this nation, or otherwise null and void."

Section 3 of the same act provides that—

"No marriage between a citizen of the United States or any foreign nation and a female citizen of this nation, entered into within the limits of this nation, except as hereinafter authorized and provided, shall be legal."

Then follows a provision making it a misdemeanor and imposing a penalty upon all persons, their aiders and abettors, who shall violate the act.

Under the provisions of this statute there can be no question but that, so far as the Choctaw nation is concerned, the first marriage of the claimant was absolutely void—that is, it was as if it had never been solemnized, leaving the parties in the legal condition as if they had not been married at all. This being true as to them, how can they now say that the second marriage is void on the ground that the first was valid? Having declared by statute that the first was void, they are now estopped from contending that the second is void because the first was valid. As far as the Choctaw nation is concerned, and it is the only party to this suit who can be heard to object, the second marriage is valid because the first was void, giving the parties the right to remarry as if the first had not occurred. It cannot be said that there was anything fraudulent in the second marriage. It simply had the effect of naturalizing the party. It gave the Choctaw nation the opportunity of inquiring into his character, which was proven good. He paid the license fee and took

the oath. The whole object of the Choctaw law was accomplished in good faith, and the mistake made by him in the forms of his first marriage was corrected by the second.

As an evidence of the fact that this ruling is just since the appeal in this case was taken, it has been proven that the claimant has been duly and regularly enrolled by the Choctaw nation. The action of the said commission in enrolling the claimant is affirmed and judgment for claimant.

SUMMARY.

1. Absent Mississippi Choctaws are not entitled to enrollment.

2. All Mississippi Choctaws who may have removed into the Choctaw nation are entitled to enrollment without respect to the quantum of blood.

3. All absent Choctaws who have permanently moved away from the nation and have not returned are not entitled to enrollment.

4. All white persons married to Choctaws in accordance with their laws are entitled to be enrolled.

5. White persons married to Choctaws in violation of the Choctaw statute are not entitled to be enrolled.

6. White men who have married Choctaws in accordance with their statute, and the wife dies and the widower afterward marries a white woman, are, with the children by such marriage, entitled to enrollment; but do not, in case of their death, confer on the white wife citizenship to such an extent that she may confer it on a second white husband and the children by such marriage.

7. A white man having married a Choctaw woman not in accordance with the Choctaw laws, afterward marries her in accordance with such laws, is entitled to enrollment.

UNITED STATES OF AMERICA,
Indian Territory, Central District.

I hereby certify that the above and foregoing are true copies of opinions handed down by me in the cases therein named and which cases were actually tried before me.

Judge United States Court for the Central District of the Indian Territory.